Supreme Court, U.S.
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No. 91-2053

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

STACIA LEE SUMWALT and
DAVID RANDALL JENKINS,
Petitioners,
v.
FRED T. BOICE, in his official capacity
as trustee in bankruptcy, EQUITY
SECURITIES-HOLDERS' COMMITTEE, UNIVERSITY
OF ARIZONA, and HYDRO GEO CHEM, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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August 17, 1992

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PETITIONERS' REPLY MEMORANDUM

In urging the Court to deny Petitioners' request for a writ of certiorari, Boice raises several issues, all of which, Petitioners demonstrate, are without merit. Petitioners herein demonstrate the issues raised in their Petition are worthy of consideration.

I. The Bankruptcy Court's Actions Are Equivalent To Granting Petitioner Stacia Lee Sumwalt Leave To Intervene.

Boice raises the issue that Sumwalt never sought nor was granted intervention by the Bankruptcy Court and, as a result, she lacks standing before this Court. Opp. at ii and 2. The Bankruptcy Court's actions, however, are equivalent to granting intervention.

The Bankruptcy Court's September 6, 1990 Order recognizes Sumwalt's opposition to the Trustee's Assumption Motion. Petition at A-8. Further, Boice raised this very issue before the Bankruptcy Court in his motion to strike Sumwalt's pleadings. The Bankruptcy Court denied Boice's motion to strike. Petition at A-11. The Bankruptcy Court also denied Sumwalt's motion to disqualify and motion for an interlocutory stay pending appeal. *Id.*

The foregoing actions by the Bankruptcy Court are equivalent to having granted Sumwalt the right to intervene since the Bankruptcy Court treated Sumwalt as if she were a party. As a result, she was bound by the Bankruptcy Court's Orders and, having been aggrieved thereby, has standing to challenge those orders on appeal. This Court has recognized that one who has been treated as a party has a right to appeal from a judgment. *Karcher v. May*, 484 U.S. 72, 77 (1987) (citations omitted). Similarly, the courts of appeal have recognized that when a trial court treats one as if they were a party, the trial court's actions are equivalent to having granted intervention. *In re Vargas*, 723 F.2d 1461, 1464 (10th Cir. 1983); *In re Beef Industry Antitrust Litigation*, 589 F.2d 786, 788-789 (5th Cir. 1979); *Roach v. Churchman*, 457 F.2d 1101, 1104 (8th Cir. 1972). Sumwalt is a party properly before this Court.

II. Hydro Geo Chem, Inc. Is A Party To This Action.

Boice suggests that Hydro Geo Chem, Inc. is not a proper party to these proceedings. This suggestion is erroneous and not

supported by case law or statute. As a threshold matter, Bankr. Rule 8001, 11 U.S.C., provides that the failure of the appellant to take any step other than the timely filing of the notice of appeal does not affect the validity of the appeal, but is ground for such action as the district court or bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal. Bankr. Rule 8001(a), 11 U.S.C. Since the District Court dismissed the Petitioners motion to join Hydro Geo Chem, Inc. as an indispensable party as moot for the reason that it dismissed the appeal as moot, the action by the District Court, as contemplated by Bankruptcy Rule 8001, has not yet been completed.

Jenkins and Sumwalt filed their timely notices of appeal to the District Court on October 19 and 22, 1991. Those notices did not list Hydro Geo Chem, Inc. as a party because the identity of Hydro Geo Chem, Inc. as the successful auction bidder was unknown to all parties at that time. However, on October 26, 1992, the day before the auction, Jenkins and Sumwalt filed notices recounting that appeals had been taken and that the trustee had a duty to inform the successful auction bidder that an appeal had been filed and that Jenkins and Sumwalt claimed that the Bankruptcy Court's taking from them of the right to use and renew the disputed athletic tickets was void, and that they intended to reclaim such rights from the successful auction bidder on appeal.

Prior to the auction and in open court, specially appointed counsel for the trustee, Susan G. Boswell, informed all auction bidders that Jenkins and Sumwalt continued their objection to the Bankruptcy Judge's jurisdiction to take their rights to use and renew the disputed athletic tickets, that Jenkins and Sumwalt intended to reclaim those rights from the successful auction bidder and that an appeal of the Bankruptcy Court's Orders had been filed by Jenkins and Sumwalt. As a result of the foregoing, both the Court, the Clerk and the successful auction bidder, Hydro Geo Chem, Inc., had written and oral notice of the appeal within the meaning of Bankruptcy Rule 8001(a).

Any argument that the notice to Hydro Geo Chem, Inc. was not filed *after* the Bankruptcy Court entered its October 27, 1990 Order confirming the auction sale to Hydro Geo Chem, Inc. is misplaced. In *Firstier Mortgage Company v. Investors Mortgage Insurance Company*, --- U.S.---, 111 S.Ct. 648, 112 L.Ed.2d 743 (1991), this Court held that a notice of appeal filed in advance of the final order shall be treated as filed after such entry and on the

date thereof. The notices filed on October 26, 1990 by Jenkins and Sumwalt, and recounted by the trustee's special counsel at the time of the auction in open court, gave actual notice to the Court, the Clerk and Hydro Geo Chem, Inc. and, in conjunction with the notices of appeal filed on October 19 and 22, 1990, complied with the requirements of Bankruptcy Rule 8001, 11 U.S.C.

Should the Court determine that it is not appropriate for it to address this issue in the first instance, and in the hypothetical event the Court decides that the appeal is not moot and vacates the Ninth Circuit's and District Court's judgments and orders accordingly, the Court can remand these proceedings to the District Court to allow the District Court to address the motion to join Hydro Geo Chem, Inc. as contemplated by Bankr. Rule 8001, 11 U.S.C. In any event, Petitioners prayed for an award of the proceeds from the sale as compensation for the taking of their rights to use and renew the disputed athletic tickets. As a result, the Court can grant effective relief whether Hydro Geo Chem, Inc. is a party or not. Accordingly, Petitioners urge the Court to address the issues raised in the Petition.

III. Petitioners Filed A Timely Notice Of Appeal.

Boice asserts that the Bankruptcy Court's September 6, 1990 Order was that court's final order, from which bankruptcy appeal time limits apply. Opp. at 2 and 5. This assertion is in error.

On August 13, 1990, Jenkins and Sumwalt separately moved the Bankruptcy Court, pursuant to 28 U.S.C. §157(b)(3), §1134-(c)(2) and Bankr. Rule 5011(b), 11 U.S.C., for its Order determining the Trustee's Assumption Motion to be non-core but related to the administration of a Chapter 11 case and for its Order abstaining from hearing and determining the matter. Petitioners objected to and did not consent to the Bankruptcy Court's subject matter jurisdiction within the meaning of 28 U.S.C. §157(c)(2); and affirmatively asserted their right to trial by jury pursuant to the Seventh Amendment of the United States Constitution.

Neither the Bankruptcy Court's September 6 nor September 17, 1990 Orders determine whether the proceeding before it was a core or non-core proceeding. Petition at pp. A-8 and A-10. Moreover, neither Order indicates whether the Bankruptcy Court intended to submit its findings of fact and conclusions of law to the District Court for entry of a final judgment pursuant to 28 U.S.C. §157(c)(1) and Bankr. Rule 9033, 11 U.S.C. At least one lower

court decision holds that the Bankruptcy Court's judgment is invalid where the Bankruptcy Court fails to determine whether a proceeding involved a core or non-core proceeding, particularly when so moved by the parties and particularly where the parties have objected to the bankruptcy court entering a final judgment. *In re Marill Alarm Systems, Inc.*, 81 B.R. 119 (S.D.Fla. 1987).

The Bankruptcy Court's October 11, 1990 Order was the first indication, implicitly or explicitly, that the Bankruptcy Court intended to treat the matter as one over which it had subject matter jurisdiction to enter a final judgment. Petition at A-13, note 1. Only then did it become apparent to Jenkins and Sumwalt that the Bankruptcy Court did not intend to adjudicate their core/non-core determination and abstention motions and did not intend to submit findings of fact and conclusions of law to the District Court for entry of a final judgment. Thereafter, Jenkins filed a timely notice of appeal on October 19, 1990 and Sumwalt filed a timely notice of appeal on October 22, 1990.[1] Jenkins and Sumwalt have met all jurisdictional time requirements to be properly before this Court. Bankr. Rule 8002, 11 U.S.C.

IV. All Issues Were Raised Before The Courts Below.

Boice suggests that the issue of Congressional intent underlying the enactment of 11 U.S.C. §363(m) was not raised before the courts below and is not properly before this Court. Boice cited *Youakim v. Miller*, 425 U.S. 231, 234 (1976) in support of that proposition. In *Youakim*, the Court recognized that it would not ordinarily decide questions not passed on or resolved in the lower court. *Youakim*, at 234. The *Youakim* Court recognized that a Supremacy Clause claim had not been presented to the District Court in the first instance. *Youakim*, at 233. *Youakim* did not specifically deal with the failure to raise Congressional intent behind a statutory claim litigated below. To that extent, Boice misleads the Court as to *Youakim's* relevance.

The issue raised in the Petition in the instant case is the same issue raised in the courts below. The issue is whether bankruptcy's mootness rule eviscerates appellate review of constitutional claims. That issue and the purpose, scope and intent

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[1] Respectively, October 20 and 21, 1990 were a Saturday and Sunday. Accordingly, Sumwalt's filing on October 22, 1990 was timely.

of 11 U.S.C. §363(m) were the cornerstone of the litigation below. Any distinction between how that issue is framed in the Petition versus the substance of the litigation below is a distinction in form without meaning in substance. Accordingly, Boice's claim that the purpose and intent of 11 U.S.C. §363(m) was not litigated below is without merit.

Boice also suggests that the Petitioners admitted below that their constitutional claims do not fall within any of the narrow exceptions to the §363(m) mootness rule recognized by the Ninth Circuit. Opp. at p. 8. This is a misleading and untrue statement. Indeed, the Petitioners cited the Ninth Circuit decision *In re Center Wholesale*, 759 F.2d 1440 (9th Cir. 1985), for the proposition that the Ninth Circuit had previously recognized that, in the absence of a stay pending appeal, only a constitutional claim would survive a claim of mootness on appeal. In that case the Ninth Circuit found that lack of adequate notice violated the Due Process Clause. The Ninth Circuit panel in the instant case failed to distinguish *In re Center Wholesale*.

V. Section 455(a) Does Not Require An Extra-judicial Source.

Boice asserts that 28 U.S.C. §455(a) requires an extra-judicial source as a basis for a judge's disqualification. Opp. at p. 9. Indeed, Boice cites prevailing Ninth Circuit precedent in support of that proposition. However, the authorities cited by Boice fail to countenance this Court's Holding in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). Based on *Liljeberg's* holding that Congress intended that disqualification under Section 455(a) is broader in scope than the more strictly construed provisions of Section 455(b), the extra-judicial source requirement is no longer an element of the law of Section 455(a).

Section 455(a) provides "Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. §455(a). There is no explicit reference to the extra-judicial source requirement in this language.

The genesis of the extra-judicial source requirement can be traced to the revision of the Judicial Code enacted by Congress on March 3, 1911 and codified as Section 21 of the Judicial Code effective January 1, 1912.[2] Section 21 was the first codification

[2] Act of March 3, 1911, Chap. 231, 36 Statutes at Large 1087-1169 (62nd

of the personal bias or prejudice standard for federal judicial disqualification.[3]

The Fifth Circuit was the first court to tie the extra-judicial source requirement to the word "personal" for purposes of interpreting the personal bias or prejudice standard. In *Henry v. Speer*, 201 F. 869 (5th Cir. 1913), the Fifth Circuit, while considering a Petition for Mandamus relief, held that the 'personal' element of the personal bias or prejudice standard engendered the extra-judicial source requirement. *Henry*, 201 F. at 871-872.

A short time later, this Court addressed its first case interpreting Section 21 of the 1912 Judicial Code. In *Ex Parte American Steel Barrel Co.*, 230 U.S. 35 (1913), this Court adopted *Henry's* reasoning as to the import of the 'personal' element of the personal bias or prejudice standard and tied that element to the extra-judicial source requirement under Section 21 of the 1912 Judicial Code. *Id.* This Court further embellished the *Henry* and *Ex Parte American* holdings in *Berger v. United States*, 255 U.S. 22 (1921). Accordingly, it was well settled by the first quarter of this century that the 'personal' element of the personal bias or prejudice standard engendered the extra-judicial source requirement.

Ultimately, Section 21 of the 1912 Judicial Code evolved into 28 U.S.C. §144 in 1948.[4] Section 144 still relies on the personal bias or prejudice standard for federal judicial disqualification, which necessarily incorporates the extra-judicial source requirement.

Section 455 was significantly revised by Congress in 1974.[5] A major concern of Congress was to eliminate the subjective opinion of the judge as the basis for determining disqualification. The superseded version of Section 455 required disqualification if, "in his opinion," it was improper for a judge to sit during the proceedings.[6] Congress replaced this subjective standard with an objective standard that obliges judges to disqualify themselves when their impartiality "might reasonably be questioned." 28

Cong. Sess. III).

[3] See, Senate Doc. 1144, 62nd Cong. Sess. III, p. 7.

[4] Act of June 25, 1948, Ch. 646, 62 Stat. 898.

[5] Act of Dec. 5, 1974, Pub. L. No. 93-512, §1, 88 Stat. 1609 (codified as amended at 28 U.S.C. §455 (1982)).

[6] Act of June 25, 1948, ch. 646, §455, 62 Stat. 908.

U.S.C. §455(a). In instituting this objective standard, Congress stressed that it was doing away with the "duty to sit" rule, which such rule required a judge to stay with the case when in doubt about disqualification.[7]

In 1988, the *Liljeberg* Court settled a conflict among the federal circuit courts of appeal and held that a disqualified judge's rulings may be vacated retroactively or prospectively. *Liljeberg*, 486 U.S. at 859-862. *Liljeberg* was this Court's first decision addressing the revised Section 455(a). In arriving at its decision, the *Liljeberg* Court held that the appearance of impartiality standard encompassed within Section 455(a) was a broader standard than the Section 455(b) stricter standards. *Liljeberg*, 486 U.S. at 860 and n. 8. As a result, *Liljeberg* effectively overruled the Ninth Circuit's prior holdings that Sections 455(a) and 455(b)(1) are assessed under the same standard.

When measured against *Liljeberg* and the standards of Section 455(a) versus Section 455(b)(1), the Ninth Circuit's approach that one standard exists for Sections 455(a), 455(b)(1) and 144 no longer appears viable. The *Liljeberg* Court found that Section 455(b)(4) imported a knowledge requirement to be operative while a plain reading of Section 455(a) did not require the judge's knowledge.

Analogously, Section 455(b)(1) imports a personal requirement to assess bias or prejudice, while a plain reading of Section 455(a) does not. It is well established in the annals of the personal bias or prejudice standard that the modifier "personal" engenders the extra-judicial source requirement.[8] Since the terms "bias or prejudice" have been used interchangeably with the notion of lack of impartiality by this Court,[9] the only difference between Section

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[7] See *Judicial Disqualification: Hearing on S. 1064 Before Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 1, 74-75 (1971 and 1973); H.R.Rep.No. 1453, 93d Cong., 2d Sess. 1, *reprinted in* 1974 U.S. Code Cong. & Admin. News 6255.

[8] *Berger* and *Ex Parte American* also stand for the proposition that since Section 21 of the 1912 Judicial Code, like 28 U.S.C. §144, requires an antedated claim relative to an adjudication on a matter, the source of the alleged bias or prejudice cannot come from the judge's rulings thereon. Section 455(a) imposes no antedating as that section is directed to the judge. *United States v. Sibla*, 624 F.2d 864, 867-868 (9th Cir. 1980). This is another factor in support of the claim that Section 455(a) does not embrace the extra-judicial source requirement.

[9] See *Ex Parte American*, *supra*; *Berger*, 255 U.S. at 33-34.

455(a) and Section 455(b)(1) is the "personal" modifier. The only way to construe Section 455(a) as broader than Section 455(b)(1) is to discount the "personal" element, thereby also discounting the extra-judicial source requirement. This Court should hold that the extra-judicial source requirement is not a part of Section 455(a) since that provision was revised by Congress in 1974.

VI. The Bankruptcy Judge's Personal Opinion Regarding The Social Allocation of Basketball Seating Was Derived From Extra-judicial Sources.

Boice asserts that the Bankruptcy Judge's personal opinion regarding the social allocation of basketball seating is not extra-judicial. This assertion is in error. The Bankruptcy Judge expressed his personal opinion in open court when, at the same time, he commanded the trustee in bankruptcy to file an action to procure the disputed athletic event tickets on November 30, 1989. There is no paper, pleading or motion filed in the Bankruptcy Court that would have allowed the Bankruptcy Judge to conclude that Jenkins and Sumwalt indeed possessed the athletic tickets. Boice and Jenkins had discussions in 1987 and 1988 that were not of record. During those discussions, Boice informed Jenkins that the Jenkins bankruptcy estate had no interest in the disputed athletic tickets. The Bankruptcy Judge could only have learned about the disputed athletic tickets from an extra-judicial source or *ex parte* communication. Based on the foregoing, the Bankruptcy Judge learned about the disputed athletic event tickets from extra-judicial sources and, as a result, is subject to disqualification.

VII. The Bankruptcy Judge's Authorization Of The Felony Conviction Is Quintessentially Extra-judicial.

Boice asserts that the Bankruptcy Judge's action to authorize the trustee to plea bargain a debtor corporation controlled by Jenkins to a felony[10] conviction in a state criminal proceeding, wherein both the corporation and Jenkins were defendants, is nothing more than legal error. Boice's assertion is wrong. As correctly decided by the Arizona Court of Appeals, the Bankruptcy Judge was

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[10] Boice suggests that the proposed conviction involved a misdemeanor. Opp. at p. 8. Boice misleads the Court. A violation of A.R.S. §44-1841 is a class 4 felony. A.R.S. §44-1841(B).

without jurisdiction to interfere in the state criminal proceedings. Petition at p. C-10 and C-11; *citing*, *Younger v. Harris*, 401 U.S. 37 (1971). The federal circuit courts of appeal, in interpreting *Younger's* mandate, have prescribed that federal courts must make the *Younger* exceptions inquiry prior to engaging in any other action. *Milner v. Burson*, 470 F.2d 870 (5th Cir. 1972), *cert. denied*, 411 U.S. 981, (1973); *In re Fussell*, 928 F.2d 712 (5th Cir. 1991); *Barnette v. Evans*, 673 F.2d 1250 (11th Cir. 1982). Not even the broad powers granted to Bankruptcy Judges under 11 U.S.C. §105 excluded their actions from the *Younger* mandate. *Barnette, supra*.

Other authorities decided by this Court support the proposition that the Bankruptcy Judge acted in the clear absence of jurisdiction. In *Stump v. Sparkman*, 435 U.S. 349 (1978), the Court distinguished "the absence of jurisdiction" concept from the "in excess of jurisdiction" concept by the following example:

> "In *Bradley*, the Court illustrated the distinction between lack of jurisdiction and excess of jurisdiction with the following examples: if a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune. *Id.*, at 352."
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> *Sparkman*, 435 U.S. at 357 n. 7; *citing*, *Bradley v. Fisher*, 13 Wall 335, 352 (1871).

The Bankruptcy Judge, analogous to the *Bradley/Sparkman* probate judge's limited jurisdiction, had a limited jurisdiction over bankruptcy matters, which jurisdiction is limited by 28 U.S.C. §157. Nothing in Section 157 empowers bankruptcy judges to interfere in ongoing state criminal proceedings, particularly to authorize the felony conviction of a criminal defendant in a state criminal proceeding. Based on the foregoing, it is unequivocal that the Bankruptcy Judge undertook the authorization of the debtor corporation's felony conviction in the state criminal proceedings in the clear absence of jurisdiction, which is quintessentially extra-judicial. As a result, both bases for the Bankruptcy Judge's disqualification are derived from extra-judicial sources.

VIII. The Issues Raised Are Worthy Of Review.

Boice asserts the issues raised in the Petition are not worthy of this Court's consideration. Petitioners have clearly demonstrated the contrary. It is important to these Petitioners, and other similarly situated bankruptcy litigants, that the Court clarify:

1) whether the mootness rule prescribed in 11 U.S.C. §363(m) eviscerates the right of appellate review, in the absence of a stay pending appeal, when a Bankruptcy Court's taking of property is flawed by substantive and procedural Due Process constitutional claims;

2) whether 28 U.S.C. §455(a) requires an extra-judicial source for disqualification after that provision was revised by Congress in 1974;

3) whether, when a Bankruptcy Judge, destined to sit as a trier of fact as well as the arbiter of law on matters to be tried by him, publicly expresses a personal opinion regarding the ultimate conclusion of the trial, a reasonable person would question the Bankruptcy Judge's impartiality;

4) whether, when a Bankruptcy Judge undertakes the authorization of a felony conviction of a debtor corporation in ongoing state criminal proceedings, a reasonable person would question the Bankruptcy Judge's impartiality; and,

5) whether, once the trustee rejects an executory contract and the Bankruptcy Court's approval thereof becomes moot because the executory contract lapses, the Bankruptcy Court has jurisdiction over post-petition executory contracts and the rights and privileges appertaining thereto.

IX. Conclusion.

For these substantial reasons, the issues raised in the Petition are worthy of this Court's review and Petitioners suggest that granting same is now in order.

Respectfully submitted,

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